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IN THE

Supreme Court of the United States

October Term 1958

No. 17

EAGLE LION STUDIOS, INC., EAGLE LION FILMS, INC., PRC PRODUCTIONS, INC., CHESAPEAKE INDUSTRIES, INC.,

Petitioners,

—against—

LOEW'S INC., RKO THEATRES, INC., and RKO FILM BOOKING CORP.,

Respondents.

BRIEF OF RESPONDENT LOEW'S INCORPORATED

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BRIEF OF RESPONDENT LOEW'S INCORPORATED

Statement of the Case

This is a motion picture antitrust suit. The petitioners, plaintiffs below, are four affiliated corporations which were engaged in the business of producing and distributing motion picture films in the period 1946-1950 (R. 557-60). At no time were they in the business of exhibiting such films (*Ibid.*). In their complaint petitioners sought to recover treble damages from the above named respondents, which are operators respectively of the Loew's and of the RKO theatres in New York City, for an alleged conspiracy on

their part and on the part of the major producer-distributors of motion pictures (R. 557-58; R. 11-13). It was stipulated that the only claim for damages was in the period from September 1, 1946 to September 1, 1950 (R. 558-59).

The alleged conspiracy, according to the complaint, was to restrain competition in the distribution of motion pictures to subsequent run or "neighborhood" theatres in the New York metropolitan area (R. 11-13). Neighborhood theatres are theatres showing films subsequent to the first runs of films on Broadway (R. 560). In essence, it was petitioners' claim that the pictures of their competitors, the major producer-distributors (defendants in *United States* v. *Paramount, et al.**), had received more favorable treatment in the Loew's and RKO theatres in New York City than did petitioners. As a result, petitioners claimed, these producer-distributors received the substantial returns from the New York subsequent run theatres which would have been petitioners' but for the alleged conspiracy.

The producer-distributors, which were alleged to have conspired with Loew's and RKO (and to have received the benefit of the playing time to which petitioners were allegedly entitled), were Paramount Film Distributing Corporation, Warner Bros. Picture Distributing Corporation, Twentieth Century-Fox Film Corporation, Big U Film Exchange, Inc., United Artists Corporation, Radio Keith-Orpheum Corporation and RKO Radio Pictures Inc., all of which were engaged solely in distribution or production of pictures (R. 6-9, 558).

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* 66 F. Supp. 323 (S. D. N. Y. 1946); 70 F. Supp. 53 (S. D. N. Y. 1946), *aff'd in part, rev'd in part,* 334 U. S. 131 (1948); *opinion on remand,* 85 F. Supp. 881 (S. D. N. Y. 1949), *aff'd,* 339 U. S. 974 (1950).

Petitioners, however, did *not* seek money damages from these alleged co-conspirators, who, if there were such a conspiracy, were its prime beneficiaries. Damages were sought only against the exhibitor-defendants, Loew's and RKO, who operated theatres in New York. In the action as originally brought petitioners sought injunctive relief, but no more, against the producer-distributors (R. 556). Because petitioners had ceased their distribution activities in 1950, when the case originally came on for trial before Hon. A. N. Hand sitting as District Judge, the producer-distributor defendants moved to dismiss the complaint as to them on the ground that the claim for injunctive relief was moot. Judge Hand granted this motion. See 121 F. Supp. 128 (S. D. N. Y. 1954), *modified on other grounds*, 219 F. 2d 196 (2d Cir. 1955). Thus, the only remaining defendants in the case were Loew's and RKO, the respondents here.

The issues to be tried as framed in the pre-trial order were as follows:

> "1. Did the defendants combine and conspire in violation of the anti-trust laws of the United States to exclude the plaintiffs from the opportunity of licensing on a competitive basis their feature motion pictures to Loew and RKO theatres which exhibit feature motion pictures in the New York metropolitan area on runs subsequent to first run Broadway?
>
> 2. If so, were the plaintiffs directly damaged in their business or property as the result of the said illegal combination and conspiracy and, if so, in what amount?"

The case was tried without jury before Hon. Archie O. Dawson in the United States District Court for the Southern District of New York. Judge Dawson denied motions

to dismiss at the close of petitioners' evidence, but in a comprehensive opinion following presentation of respondents' case granted judgment for them on two separate but equally decisive grounds:

> (1) that petitioners had failed to prove any conspiracy on the part of respondents to exclude petitioners from the opportunity of licensing their feature motion pictures on a competitive basis to the Loew's and RKO theatres on subsequent run in New York City, and
>
> (2) that even assuming the existence of such a conspiracy, petitioners "failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the defendants to deprive the plaintiffs of such opportunity to license their pictures on a competitive basis" (Dawson, *J.*, R. 581). In support of such finding Judge Dawson made certain specific findings of fact, *first* as to the inferior quality of petitioners' films for the New York market, *second* as to the failure of petitioners to call a single witness to testify to any efforts to license their pictures, and *third* as to the fair treatment accorded petitioners' pictures in respondents' theatres, and these findings were abundantly supported by the evidence.

We emphasize that this second, independent ground for the District Court's decision, which involved *solely* factual issues, is completely dispositive of this appeal.

On September 9, 1957 the Court of Appeals affirmed the judgment of the District Court. Judge Waterman wrote the opinion of the Court, which was concurred in by Judge

Hincks, with Chief Judge Clark dissenting. In affirming the judgment below, the majority of the Court of Appeals held that the decree and findings and conclusions in the *Paramount* case did not establish *prima facie* the conspiracy alleged by the petitioners in the case at bar. In addition, the Court of Appeals, applying Rule 52(a) of the Federal Rules of Civil Procedure, affirmed the District Court's findings of fact (R. 692), supporting this affirmance with a detailed review of the evidence offered by petitioners and by respondents in respect of any discrimination against petitioners' pictures.

Questions Presented

The questions presented by petitioners in their brief (pp. 2-3) do not accurately reflect the proceedings below or raise the issues decisive of this appeal. We pose as a decisive issue the following:

> Is the finding of fact by the District Court that petitioners' damages, if any, were not proximately caused by the existence of a conspiracy against independent distributors so clearly erroneous as to warrant reversal by this Court?

If this Court upon review of the record sustains that finding, the judgment appealed from must be affirmed. For implicit in the finding is the assumption that the claimed conspiracy against independent distributors actually existed, but that, nonetheless, the petitioner-distributors at bar were not adversely affected thereby.

The question of whether the courts below correctly interpreted the *Paramount* decree is reached only if this Court rejects the evidence and findings on the issue of

impact. In that event the question presented would be whether the conspiracy against independent distributors was established in the *Paramount* case, and if so, whether the *prima facie* presumption of such conspiracy was rebutted by respondents' proof.

Summary of Argument

To support their claim of impact upon them of the alleged conspiracy against independent distributors, petitioners relied almost entirely upon statistical evidence comparing the performance of their pictures in the New York metropolitan area with those of the distributor-defendants in the *Paramount* case. Indeed, respondents argue (Brief, p. 31) that these statistical ratios were offered *only* to prove "impact." However, such proof was and is demonstrably fallacious. For example, the District Court specifically found that *on petitioners' own statistics* their pictures having a national rental of less than $500,000, which constituted 90% of the 195 pictures on which their claim was based, they did "as well as the eight major distributors" in the New York metropolitan subsequent runs (R. 574).

If, as petitioners claim, but did not prove, their pictures did not do as well in the New York metropolitan sub-runs as those of the eight distributor-defendants in the *Paramount* case, the independent evidence establishes that this was due to their relatively poor quality for New York audiences and to petitioners' bad reputation in the field.

It was against this background of statistics, which proved as much, if not more, in respondents' favor, and of affirmative proof as to the poor quality of petitioners'

pictures, plus their failure to call a single witness who engaged in the licensing of these pictures, that the District Court made its finding that petitioners had failed to prove that any losses which they may have sustained were proximately caused by any combination or conspiracy on the part of the respondents.

Under Rule 52(a) of the Federal Rules of Civil Procedure as interpreted by decisions of this Court, the Court of Appeals was entirely correct in affirming the District Court's findings and such affirmance should not be set aside unless "clearly erroneous." We shall show that the findings were not only *not* "clearly erroneous" but were compelled by the evidence presented at the trial. Even if the petitioners should prevail in their contention that the *Paramount* decree established *prima facie* the existence of the conspiracy which they charge, this would not cure their fatal failure to prove any adverse effect upon them caused by such conspiracy. Petitioners have had an opportunity to present their proof on this issue, the District Court cautioned them on the contradictory effect of their statistics and gave them an opportunity to improve their proof (R. 348-49), which they were unable to do, and it was thereafter found to be insufficient. Petitioners have had their day in court and they should not be permitted to go back again as the dissenting opinion below suggests.

In the construction and application of the *Paramount* decree, the Courts below were also correct. The record wholly belies any contention that they did not, as required by the ruling of this Court in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), consider all relevant portions of the record in the *Para-*

mount case in order to determine what had been distinctly put in issue and directly determined. Three of the four judges who passed on this case in the lower Courts concluded that the conspiracy charged by petitioners had not been determined to exist in the *Paramount* case. This conclusion neither enunciates nor results from the application of any rule of law which would be prejudicial to sound antitrust enforcement. Nor is it any evidence of "hostility" toward antitrust cases, any more than any decision for an antitrust defendant deserves the epithet "hostile."

Finally, anything established in the *Paramount* case has, under Section 5 of the Clayton Act, only *prima facie* effect in subsequent cases. Accordingly, to rebut any presumption that might have arisen on the issue of illegal conspiracy, respondents in their case proved such facts as: Respondents Loew's and RKO licensed pictures during the four-year period in question from at least 30 different distributors, they screened every picture offered them by petitioners and during the four-year period they each licensed over 89 of petitioners' 195 pictures (R. 562-63). Upon such facts, proven and found below, even if the conspiracy alleged by petitioners were adjudged to have been established in the *Paramount* case, it has been decisively rebutted by the direct evidence presented by the respondents. Therefore the Courts below were in any event correct in ruling that petitioners had failed to prove the existence of the conspiracy which they alleged.

ARGUMENT

I

The District Court's Finding Of Fact That There Was No Proof Of Causal Connection Between Petitioners' Business Losses And The Conspiracy Claimed To Have Been Established In The *Paramount* Case Calls For Affirmance By This Court Of The Judgment Below.

A. A private litigant must establish more than the existence of a conspiracy; he must prove impact of the conspiracy upon him and damages resulting therefrom.

The *amicus* brief filed by the Government on the present appeal joins petitioners in asserting that the *Paramount* case established the existence of the conspiracy claimed by petitioners. However, at the same time the Government brief is very careful to point out that *prima facie* establishment of the existence of the conspiracy by the *Paramount* decree is not enough; in addition, petitioners are required to prove, as the other elements in their *prima facie* case, "impact" and resulting damages.

Says the Government brief (pp. 14-15):

> "To use the judgment for this purpose, the petitioners did not need to show by reference to the *Paramount* record that the conspiracy in that case was specifically directed against themselves. *Emich Motors* v. *General Motors*, *supra*, at 571. But they were required to establish the other aspects of their *prima facie* case—namely, ' * * * the impact of the [general] conspiracy on them * * * and evidence

> of any resulting damages.' *Ibid.*; cf. *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 543. On these other aspects, the Government, because of the nature of its interest in this case (*supra*, pp. 5-6), makes no comment and takes no position."

Even petitioners themselves acknowledge the necessity of proving the presence of the three elements of their case, namely, conspiracy, impact and resulting damages, and they recognize the distinction between them, for at page 31 of their brief in this Court they state that their statistical ratios as to relative performance in the New York metropolitan area were "offered only to show the impact of the respondents' illegal conduct upon Eagle-Lion's business in the monopolized market."

One of the clearest statements of the rule enunciated by the *amicus* brief, and recognized by petitioners, was made in *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.*, 197 F. 2d 629 (2d Cir.), *cert. denied*, 344 U. S. 875 (1952). In that case plaintiff proved that the defendants had been convicted of a criminal conspiracy to violate the antitrust laws; it did not, however, establish any causal connection between that conspiracy and its business failure. In affirming a dismissal of the complaint, the Court of Appeals stated:

> "The trial court dismissed the claim. Needless to say, this was justified unless plaintiff could show some connection between Monticello's failure and defendants' proven conspiracy; *the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field.*
>
> * * * * *

Absent a showing of causal connection between the collusion and jobbers' refusals to handle plaintiff's product, dismissal was mandatory." 197 F. 2d at 631, 633.*

B. The poorer results which petitioners claim their pictures suffered in the New York area were not the result of any conspiracy.

Petitioners did not call a single witness to testify to any difficulty that they might have had in licensing their pictures in the New York area, and they expressly disclaimed any discrimination against any single or particular picture. William C. MacMillen, Jr., President of one of the petitioners, Chesapeake Industries, Inc., testified that: "The gist of our complaint is not against any particular pictures" (R. 124). The District Court noted this concession, stating that "plaintiffs admitted that they had no complaint as to their treatment on any particular picture" (R. 567).

Petitioners failure to make any claim as to individual pictures or to adduce any evidence whatsoever on their selling efforts in the New York market is fatal to their case. The pre-trial order entered herein framed the issues to be tried in terms of whether respondents had conspired illegally to exclude petitioners "*from the opportunity of licensing*" their pictures competitively (R. 557). But the record is barren of any evidence from petitioners as to what took place in the process of licensing their pictures to Loew's or RKO. No evidence was proffered to show that petitioners had offered to Loew's or RKO any picture on rental terms they thought deserving or that Loew's

* Unless indicated otherwise, emphasis throughout is ours.

or RKO rejected any picture offered to them by petitioners. Absent such evidence how can it be said that petitioners were excluded from the "opportunity of licensing" their pictures competitively? Nothing in the record shows that petitioners were not given an opportunity to license any picture on any terms to which petitioners at the time believed it was entitled.

The District Court commented on petitioners' failure of proof in this regard as follows:

> "Plaintiffs offered no testimony of any of their sales executives with reference to efforts made to secure licensing of pictures distributed by them during the period covered in the complaint from which any inference could be drawn that they were discriminated against. The only testimony of an officer of the plaintiffs was the testimony of Mr. MacMillen, the president of Chesapeake Industries, Inc., who stated that he 'personally had nothing to do with the sale or distribution of pictures to the exhibitors' * * *.
>
> If plaintiffs had been discriminated against *in the competitive licensing* of their pictures to the defendants, it is strange that some testimony was not produced by the plaintiffs from those persons who had been its officers and agents in the period covered by the complaint to show what efforts they made to get specific pictures exhibited by these defendants and what the results were of such efforts. No such evidence was introduced." (R. 566, 567)

Judge Waterman, also, noted the absence of such proof on the crucial issue. He stated (R. 705):

> "Perhaps significantly, the plaintiffs did not put on the stand any individuals who had been engaged in negotiating for the distribution of their pictures

> during the period of the alleged conspiracy, and who would have had first hand knowledge of conspiratorial discrimination, if any, experienced by the plaintiffs."

Instead, petitioners presented a purely statistical case. They took 195 pictures which they had distributed in the four seasons 1946 through 1949 and computed the percentage of their national revenues which came from the neighborhood run theatres in the New York metropolitan area. This percentage was asserted to be 6.4%. They then took 12 pictures of each of the eight major distributors, three for each of the same four seasons, and computing a similar percentage of local to national receipts, asserted that the eight major distributors derived 8.9% of their national revenues from the New York metropolitan area (Pl. Ex. 10, R. 257, 647).

The District Court, in dealing with the factual question of whether the poorer results claimed to have been achieved by petitioners' films in the New York metropolitan area were due to "the conspiracy" or whether they were due to the comparative quality of petitioners' films, stated (R. 576-78):

> "We are considering two different classes of merchandise—one of a moderate grade [plaintiffs'] and the other of a much higher grade [the major distributors', the alleged conspirators'] • • •.
>
> Plaintiffs' argument would presuppose that any such merchandise, no matter what its grade, would do proportionately as well in New York as it does nationally. • • •
>
> • • • the fact that a picture did better or worse in the Country as a whole than it did in New York is

not proof that it was discriminated against in New York or that it suffered lack of a competitive opportunity in New York. * * *

* * * * *

Although practically all of the films distributed by the plaintiffs were inferior in quality and drawing power to those distributed by the major distributors, the difference in net returns only became markedly apparent in those films which grossed nationally more than $500,000. This is evident when we see that 97 of the 195 pictures distributed by plaintiffs had national film rentals of less than $100,000. Included in those pictures were re-issue pictures of an antiquity which makes them almost part of the folklore of the cinema.*

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* Such as the following pictures which, in the four years involved in this action, had the following gross national revenue:

'GETTING GERTIE'S GARTER'	$17,400
'UP IN MABEL'S ROOM'	17,000
'TWIN BEDS'	15,600
'TILLIE'S ROMANCE'	13,400

Included in the list were also such pictures as 'CATTLE QUEEN' which had a national gross revenue in this period of $2,800 and 'WEAKER SEX' which had a national gross revenue of $7,300."

The abysmally low quality of petitioners' pictures is shown by the fact that over 90% of their pictures, as compared with only 36% of the eight distributors' product, had an aggregate national gross rental of less than $500,000. Only 3% of petitioners' pictures grossed over $1,000,000 nationally, as compared with 41% of the eight distributors (Dawson, *J.*, R. 575; Loew's Ex. B, R. 306, 669). Of their 195 pictures, 40 were "Westerns", 43 were foreign films made abroad and 26 were re-issued films (Dawson, *J.*, R. 564).

In finding that petitioners' pictures were not as well adapted to the New York market as those of the eight major distributors, the District Court had the benefit of the oral testimony of Mr. Russell Downing, President and Managing Director of Radio City Music Hall: "* * * a large and representative motion picture theatre which was not in any way affiliated with, or connected with any producer or distributor" (Dawson, *J.*, R. 577-78), and of Mr. Max Youngstein, who was in charge of "advertising, publicity and exploitation" for petitioner Eagle Lion Films during two of the four years involved in this case (Dawson, *J.*, R. 567).

Mr. Downing, for example, testified on the subject of the comparative quality of the petitioners' and the eight major distributors' pictures as follows:

> "The product of the eight distributors you mentioned was much more diversified, in many instances, larger-budget pictures, as we call them in the trade, and more of the type that the metropolitan audience which you have in New York will patronize.
>
> We have a peculiar condition in New York City. A great many pictures that will do well in the wide open spaces—and there is a large area of that type in the United States, as you know—pictures that will do well in that area will just not do well in the New York market because people are not familiar with that way of life, and so we try to avoid in the Music Hall—and I feel the Music Hall in a sense is no different from any other theatres in the area—we try to avoid playing pictures that people don't want. It is our job to find entertainment they want and we want pictures they will patronize." (R. 526)

Mr. Downing went on to testify that out of the 195 Eagle Lion pictures, only four were submitted by Eagle

Lion to Radio City Music Hall for screening and consideration, and that these pictures were not accepted because, in the opinion of this highly qualified and completely independent witness,* they did not measure up to the standards and the quality required to attract New York audiences. *Not one* Eagle Lion picture was shown at the Music Hall during the four-year period involved in this suit, although each of the eight major distributors had pictures exhibited at that theatre during the period in question (R. 523-25; Dawson, *J.*, R. 578).

Mr. Youngstein, who as noted above was in charge of advertising, publicity and exploitation of the Eagle Lion pictures from 1946 until May of 1949 and had first-hand knowledge of petitioners' 195 pictures "with the exception of a few at the very end" (R. 509), testified that in terms of relative box-office appeal the product of the petitioners was "with the exception of Monogram, • • • at the very bottom rung of the ladder" and was "much inferior" to that of the eight distributors (R. 510).

Mr. Youngstein further testified in answer to a question by the Court (R. 520):

> "Q. Taking the Eagle Lion list of pictures generally while you were there, was it your impression that they would do better or worse proportionately in New York? A. Overall, in my opinion they would do worse in New York because they were not to any large extent critics' pictures. New York is one of the few places where critics' reactions help box office and help determine the entire selling of the picture from first run in the circuit, in the second, third and fourth run down the line until you

* Downing at the time he testified had been associated with Radio City Music Hall for nearly 23 years (R. 522).

> have blanketed the metropolitan territory. That is not only New York City alone. That is the entire metropolitan territory. The newspapers have that importance.
>
> The very nature of this product at that time, with the exception of a picture like a Red Shoes or perhaps a Quartet, one or two others, if I took the time out to search through, but overall these were pictures that received terrible reviews in New York, they receive very bad trade paper reviews. *They are pictures which I would say would do much better outside of New York than in New York.*"

In light of this record, it is not surprising that the District Court found that petitioners' losses, if any, were not proximately caused by any conspiracy by respondents.

In petitioners' brief in this Court they contend (pp. 14-15) that by reason of the alleged conspiracy they were unable to obtain distribution rights for the product of reputable independent producers. Whether this argument is advanced to establish the impact of the alleged conspiracy upon petitioners or as general proof of damages is difficult to ascertain. In either event the paucity of any proof of the contention is in keeping with the rest of petitioners' case, for to show the knowledge of independent producers of the alleged discrimination against petitioners they rely on only three items: a letter written in 1948 by Arthur Krim, the then president of Eagle Lion, to Joseph Vogel, president of Loew's, complaining about the poor showing of Eagle Lion films in the New York market (Pl. Ex. 30, R. 505, 650), the testimony of Leon Kaplan, a West Coast attorney and the testimony of William MacMillen, president of one of the petitioners, as to conversations which they had with various independent producers wholly unconnected with the parties in this case.

Mr. Krim's letter is, as the Court of Appeals noted in the case of Mr. MacMillen's testimony (R. 704), at best a self-serving declaration which is categorically denied in Mr. Vogel's reply (Pl. Ex. 30, R. 505, 651), and the conversations between Mr. Kaplan and Mr. MacMillen and the independent producers are entirely incompetent on the question of the *existence* of any discrimination by respondents against petitioners' pictures; as such, they would have been hearsay upon hearsay.

If, as petitioners contend, they did experience a reluctance on the part of reputable producers to utilize their distribution services, it was not due to any act on the part of respondents but rather because of petitioners' complete lack of experience and their reputation for selling inferior merchandise. The executive producer of Eagle Lion, who in 1946 was charged with the duty of organizing a new studio, had had no prior experience in that capacity (R. 513). The vice president in charge of operations for Eagle Lion from 1948 on had had only two years prior experience in the motion picture industry and this had been acquired not in actual operations but in a part-time job as assistant secretary of the holding company, Chesapeake Industries (R. 65-66, 115). Far worse than that, however, was the reputation in the industry of these petitioners. Mr. Youngstein, in charge of promotion and exploitation for Eagle Lion, testified that there was "tremendous resistance to Eagle Lion pictures for many reasons" (R. 513). The Court asked "What were the reasons?" Mr. Youngstein answered as follows (R. 513):

> "A. Number one was the quality of the films themselves; number two, in my opinion, was that actually we were an amalgam of three companies trying to get together. One was then called PRC, Pro-

ducers Releasing Corporation, *which had one of the worst stenches in the history of this business as a producer and distributor of films.* Some of its product was carried over.

Then you had the business of launching a company which was a new company in a highly competitive field under the name Eagle Lion, which was unknown in this country. There was such a company overseas. That brought with it not only Hollywood product but products from J. Arthur Rank, English product.

And there was, and has been, historically, and right to this day, a great resistance to the playing of English product because exhibitors who have tried it found that on any continuing basis this would not pay off at the box office.

So you were trying, not only to sell an English picture, you were trying to launch a new company which was made up out of strange composite parts, an old PRC company, which was very bad, and Eagle Lion Company, *which had no known continuous history of producing or distributing quality films.*"

The District Court made specific findings on the singular lack of success experienced by petitioners on a world-wide basis:

> "Plaintiffs, throughout their entire history, have been weak companies. During the years 1946 through 1951, the plaintiffs lost over $13,000,000 in the production of films and nearly $3,000,000 in the distribution of films. *These losses were admittedly not the result of any competitive situation which might have existed in subsequent run theatres in the greater New York metropolitan area.*" (R. 563)

If petitioners had difficulties in persuading reputable independent producers to make their pictures available to

these companies, we respectfully submit that the foregoing direct evidence of the character of this enterprise is worthy of credence over the hearsay upon hearsay tendered by petitioners.

C. The statistics offered by petitioners are utterly fallacious and prove, if anything, the contrary of any impact of a conspiracy upon them.

During the period 1946-1950 petitioners distributed 195 motion pictures* (Dawson, *J.*, R. 561). No claim was made by petitioners that these were excluded from the RKO and Loew's circuits in New York (R. 25). On the contrary, petitioners concede that the proportion of their films actually exhibited on those circuits was "substantial" (R. 342). In fact, respondent Loew's during the four-year period exhibited 110 of petitioners' pictures, including 89 of the 195 pictures upon which their ratios are based (Loew's Ex. E, R. 469†; Loew's Ex. F, R. 506, 673; Dawson, *J.*, R. 562).

Moreover, petitioners conceded that they were making no claim based upon discrimination against any individual picture (R. 124) or against any classes of pictures (R. 305).

What petitioners purport to be complaining of is what happened to their entire product (R. 305), "the overall view of [petitioners'] business as compared to the overall view of [the other distributors'] business" (R. 370). By a process of elimination, therefore, and considering the nature of their evidence, petitioners claimed nothing more or

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* One of them was distributed twice, which accounts for occasional reference to 196 pictures or items (R. 561).

† This exhibit is not part of the printed record but will be presented to the Court in accordance with Rule 38 of the Supreme Court Revised Rules. This information applies to any citation to an exhibit which is marked "†".

less than that respondents combined and conspired, not to exclude petitioners' pictures completely, not to discriminate against individual films of the petitioners, not to discriminate against classes of their films, but solely to prevent petitioners from faring as well on New York subsequent runs, as compared to their performance nationally, as did the eight major distributors.

To prove this, petitioners offered statistical ratios. One such ratio was calculated for petitioners and another for the eight major distributors. In the case of the petitioners the ratio is based on receipts from 195 pictures and shows that they derived 6.4% of their national revenue from New York metropolitan subsequent run theatres (Pl. Ex. 10, R. 257, 647). In the case of the eight major distributors, petitioners selected 96 "median" pictures and found that the eight major distributors derived 8.9% of their national revenue from New York metropolitan subsequent run theatres (*Ibid.*). Petitioners argued that the differential of 2.5% proved the impact of the conspiracy on them (R. 31).*

Petitioners insist that the District Court's rejection of these statistics as proof of impact or proximate cause was the "inevitable result" of that Court's failure to find the existence of the conspiracy charged (Brief, p. 29). Petitioners assert further that had the District Court given proper effect to the *Paramount* decree, "these statistics would have appeared in a wholly different light" (Brief, p. 31).

On the contrary, the statistics, the assumptions upon which they are based and the inferences sought to be drawn

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* As noted above, petitioners in their brief to this Court state in respect of these ratios (p. 31):

> "But the proof was offered only to show the impact of the respondents' illegal conduct upon Eagle Lion's business in the monopolized market."

from them are so inherently fallacious as to preclude their use in support of any finding of impact of conspiracy upon petitioners, even assuming the existence of the conspiracy against independent distributors. To demonstrate to this Court the total unreliability of these statistics, even when viewed in the most sympathetic light, we take up several of the more outstanding fallacies:

First. The figures for the New York subsequent run market which went into the ratios shown in Plaintiff's Exhibit 10, both for the petitioner and for the eight other distributors, include receipts not only from approximately 100 theatres of defendants Loew's and RKO but *receipts from the 500 to 700 other New York metropolitan subsequent run theatres as well* (R. 141-42, 298). One cannot tell whether the difference between the two ratios shown on Exhibit 10 is due to petitioners' experience with RKO and Loew's or, on the contrary, petitioners' experience in the 500 to 700 other theatres making up the subsequent runs in the New York area (R. 74; Loew's Ex. H, R. 529, 675). In fact, Judge Waterman in his opinion in the Court below (R. 702-03) pointed out that petitioners' own statistics showed that in the two major billing categories* petitioners obtained a higher percentage of their total New York subsequent run rentals from the Loew's and RKO theatres than did the eight major distributors from the Loew's and RKO theatres. He concluded with the statement which is based upon petitioners' own statistics:

> "Thus on pictures falling into these two categories, the plaintiffs fared proportionally better in the defendants' circuits, as compared with other New York neighborhood theatres, than did the eight majors—a

* There are three categories: "Long Half of the Week—Top or Equal Billing", "Long Half of the Week—Second Billing", and "Short Half of the Week" (R. 561-62, 702).

fact clearly tending to rebut the plaintiffs' claims of discrimination against their pictures by the defendants." (R. 703)

At the very least, therefore, the inclusion of the additional New York theatres in petitioners' computation makes it impossible to use this exhibit to support a finding that the Loew's and RKO theatres discriminated against petitioners' pictures.

Second. What petitioners did in computing the ratios was to lump eight distributors' and four years' product together, and extract from the conglomeration a single ratio. This procedure completely conceals the extremely varied nature of the underlying data:

Two of the alleged conspirators, United Artists and Universal, had ratios for the four-year period of only 6.5% and 6.6% respectively (see Loew's Ex. I, R. 530†). These were within *.001* and *.002* of petitioners' ratio of 6.4%.

When the ratios of each of the 96 pictures of the eight distributors are separately calculated, we find that the eight had almost as many pictures with ratios of less than 6.4% (petitioners' ratio) as they had with more than 6.4%. The difference is actually only 7 pictures; there are 44 with ratios below 6.4% and 51 above (Loew's Ex. J, R. 530†).

If, instead of taking one over-all four year ratio for petitioners 195 pictures (6.4%), ratios are computed for *each* of the four years involved, it will be seen that petitioners' ratios are as follows:

1946-7	4.2%
1947-8	6.9%
1948-9	5.4%
1949-50	8.1%

When these yearly percentages are compared with the annual ratios of the eight distributors (Loew's Ex. I, R. 530†), it will be seen that while in the first year all eight of the other distributors had higher ratios than petitioners, as the years went by petitioners' ratios, designated "E-L" on the table below, surpassed those of the distributors listed below:

1946-47	*1947-48*	*1948-49*	*1949-50*
			E-L
		E-L	Fox
		Fox	Univ.
	E-L	Univ.	Col.
E-L	Univ.	U.A.	U.A.

This record of progress by petitioners corresponds with progressively rising quality of petitioners' product. In the 1946-1947 season, 20 of petitioners' pictures were westerns, whereas the number of westerns distributed by petitioners in the next three seasons (1947-1948, 1948-1949 and 1949-1950) decreased to eight, four and three respectively (R. 188, 231). Moreover, in 1946-1947, petitioners did not have a single picture that played in a first-class *first run* theatre; in the three years that followed, they had 24 such pictures, with nine in the last year (RKO Ex. A, R. 370†).

This analysis makes clear what Plaintiffs' Exhibit 10 hides, namely, that petitioners' New York ratio was directly affected by the quality of their pictures.

Third. Even if all of the other defects in Exhibit 10 are disregarded, there remains the cardinal objection that this exhibit was prepared without any consideration of whether petitioners' 195 pictures were in any way comparable to the 96 pictures of the eight distributors, whether in type, quality or otherwise (R. 235). As Mr. Youngstein testified,

in terms of relative box-office appeal the product of the plaintiffs was "with the exception of Monogram, * * * at the very bottom rung of the ladder" and was "much inferior" to that of the eight distributors (R. 510). Indeed, the petitioners themselves

> "never * * * contended that across the board our program or the quality of our pictures were always on the same level of theirs, * * *." (R. 262)

Moreover, the suitability of particular pictures varies geographically (R. 406, 408, 519-20, 525-26) and according to such factors as star value, timeliness of subject (R. 412-13) and religious aspects of the subject matter (R. 406). The record demonstrates clearly that petitioners' product dealing with such subjects as the oil territory around Tulsa (R. 406), the Wild West and the wide open spaces (R. 408, 231, 526), have a greater appeal to audiences outside the New York metropolitan area. It will be recalled (pp. 15-17 above) that both Mr. Downing of the Music Hall and Mr. Youngstein had testified fully and without contradiction on the very low quality of petitioners' product generally.

The evidence of relative quality was not limited to the testimony of independent witnesses. Petitioners' counsel themselves stated that "nation-wide films rentals * * * is the best index of quality you have" (R. 265) and that "what pictures actually grossed * * * is the primary evidence of the box-office appeal of individual pictures" (R. 518). Application of the measure of quality thus designated by petitioners' counsel demonstrates with utmost clarity the vastly inferior quality of petitioners' product.

Measured in terms of box-office appeal, the disparity in the make-up of petitioners' group of 196 items as com-

pared with the eight majors' group of 96 pictures is shown by the facts that

— Petitioners, in arriving at their ratios of 6.4% vs. 8.9%, have utilized on the one hand 195 films producing national sales in dollars for petitioners varying from $2,800 to $1,985,000 per picture, and on the other hand 96 pictures producing dollar sales for the eight distributors varying from $46,900 to $5,459,500 per picture.

— Petitioners' group of pictures consists of 177 items with national dollar sales below $500,000 (90% of petitioners' 195) as compared with only 35 of the same classification for the eight other distributors (36% of 96 items).

— Of petitioners' remaining 18 items, those over $500,000, only 7 were in excess of $1,000,000 (and none over $2,000,000), whereas of the eight distributors' 61 items in excess of $500,000, 40 were in excess of $1,000,000, of which 18 were in excess of $2,000,000 (8 of the 18 being in excess of $3,000,000) (Pl. Ex. 11, R. 142†; Loew's Ex. A, R. 531†; Loew's Ex. B, R. 306, 665, Dawson, *J.*, R. 575).

The table below demonstrates the situation:

National Rental	No. of Petitioners' Films	No. of "8s'" Films
Under $ 500,000	177 (90%)	35 (36%)
$500,000 to $1,000,000	11	21
Over $1,000,000	7 (3%)	40 (41%)
Total	195	Total 96

The comparing of averages of over-all groupings with such disparate components as are present here produces an obvious statistical distortion.

If instead of making an over-all comparison of two groups, the make-up of which is so disparate, we compare groups of films having similar national film rentals, it becomes obvious that the statistics offered by petitioners do not go to prove that they were adversely affected in the New York market. Of petitioners' 195 films, the 177 which had an aggregate national film rental of $500,000 or less had a relatively *more* satisfactory return from New York metropolitan subsequent runs than did the films of the eight distributors in the same national rental bracket. That is, the ratios of New York subsequent run rental to rental from the rest of the country for petitioners' pictures in this bracket, were *greater* than the corresponding ratios for the films of the eight other distributors in the same under $500,000 bracket (R. 298-302, 304). The situation is shown as follows on Loew's Exhibit B (R. 306, 669):

National Film Rentals	Number of Petitioners' Pictures	Petitioners' Ratio	Number of Pictures of 8 Other Distributors	Ratio of 8 Other Distributors
Under $100,000	97	6.9%	7	5.2%
$100,000–$200,000	51	5.4	10	4.9
$200,000–$300,000	10	6.7	7	6.6
$300,000–$400,000	16	5.9	6	5.1
$400,000–$500,000	3	8.6	5	7.1
All pictures under $500,000	177	6.2%	35	5.9%

Of the remaining 18 films of petitioners—those which had a national rental of over $500,000—each and every one had its first neighborhood run in the entire circuit of Loew's or RKO (Loew's Ex. F, R. 506, 673). Seventeen of the 18 pictures played the long half of the week, and 6 had top billing. (*Ibid.*)* There was testimony that each of these pictures received the best playing time and playing position to which its merits entitled it (Loew's Ex. F, R. 506, 673; R. 469-76, 511-12), and this proof as to these 18 pictures was never contradicted, even though petitioners were previously apprised by the District Court of this gaping hole in their case (R. 348-50). It is little wonder that the District Court found (R. 575):

> "All of these films each had a first neighborhood run in the entire Loew's or the entire RKO circuit in metropolitan New York. Seventeen of the pictures played the long half of the week, and six had top billing. This is certainly not proof of exclusion or lack of a competitive opportunity. Nor was there any proof that these pictures were entitled to a better place on the circuits."

In light of the gaping fallacies, if not clear-cut contradictions, in petitioners' statistics and of this entire record, it is impossible to accept petitioners' argument (Brief, p. 31) that:

> "Had the District Court given proper effect to the *Paramount* decree as required by Section 5 of the Clayton Act, *these statistics would have appeared in a wholly different light.*"

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* These six features had ratios as follows: T-Men, 12.2%; He Walked by Night, 15.5%; Canon City, 13%; Red Shoes, 12.2%; Destination Moon, 7.9%; Jackie Robinson Story, 10.3%.

D. The Court of Appeals having affirmed the District Court's findings and decision of no impact, the judgment should be affirmed.

Judge Waterman, in discussing the evidence introduced other than the *Paramount* decree, stated that to support a judgment for petitioners it would be necessary to find a conspiracy by the defendants "adversely affecting these plaintiffs" (R. 698). He examined petitioners' evidence in considerable detail (R. 698-705) and concluded that there was no evidence that respondents discriminated against the petitioners' pictures. The Court of Appeals affirmed the judgment for respondents, stating that "we do not believe that the trial court's findings of fact were 'clearly erroneous'. Fed. R. Civ. P. 52(a)" (R. 692).

Under these circumstances this Court should not disturb these findings unless it finds them to be clearly erroneous. *United States* v. *du Pont & Co.*, 351 U. S. 377, 381 (1956); *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 393-95 (1948). Nor will this Court try the facts of cases *de novo*. *United States* v. *du Pont & Co., supra; Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 597 (1951).

As this Court stated in *Graver Tank & Manufacturing Co., Inc., et al.* v. *Linde Air Products Co.*, 339 U. S. 605, 609-10 (1950):

> "Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous."

We submit that the findings of Judge Dawson, as affirmed by the Court of Appeals, are not only not "clearly erro-

neous", but are compelled by the weight of uncontradicted evidence and should not be disturbed by this Court.

E. Petitioners have confused the rule of damages in the *Bigelow* case with the requirement of establishing a causal connection between economic losses and the claimed conspiracy.

Petitioners argue that the trial court failed to comply with the rule laid down by this Court in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251 (1946). That rule is as follows:

> "The jury would conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes*, the defendants' wrongful acts had caused damage to the plaintiff.
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> • • • • •
>
> • • • the wrongdoer may not object to the plaintiffs' reasonable estimate of the cause of injury and of its amount, *supported by evidence* because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable." 327 U. S. at 264, 265.

The decisive difference between the case at bar and the *Bigelow* case lies in the fact, which we have referred to previously, that petitioners did not call a single witness who was engaged in the distribution of its pictures in the New York metropolitan area or any other part of the United States. Notwithstanding the District Court's urging that they call such a witness, petitioners elected not to do so (R. 104-5). The only witness called (and he was called by respondents) who could testify with knowledge as to any "reasonable estimate of the cause of injury"

was Mr. Youngstein, who as we have pointed out was in charge of promotion and exploitation of petitioners' pictures, and his testimony was all to the effect that the cause of petitioners' difficulties lay in the comparatively poor quality of their pictures (R. 509-14). Thus, the District Court's finding that petitioners were not injured as a proximate result of any conspiracy which they may have proved was certainly reasonable and certainly supported by the evidence, and the *Bigelow* case cannot be relied upon for any reversal thereof. Indeed, we submit that an opposite finding would have been subject to reversal as "clearly erroneous."

This Court has ruled that:

> "It is true that there was uncertainty as to the *extent* of the damage, but there was none as to the *fact* of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562 (1930)*

Both the *Bigelow* and *Story Parchment* cases involved the affirmance of jury verdicts awarding damages to the plaintiff. In both cases this Court ruled that it would not

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* In conjunction with *Bigelow*, *Story Parchment* has frequently been cited and followed by lower courts. E.g., *Momand* v. *Universal Film Exchanges*, 6 F. R. D. 4[illegible], 420-21 (D. Mass. 1947) (Wyzanski, J.), *aff'd*, 172 F. 2d 37 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368 (9th Cir.), *cert. denied*, 355 U. S. 83[illegible] (1957).

upset a jury verdict based upon reasonable though inexact proof of the *amount* of damage, once the *fact* of damage had been clearly shown. In this case, quite to the contrary, the District Court has found that the *fact* of damage was *not* shown. In other words, the findings below establish that petitioners' damage, if any, was not the certain result of the conspiracy against independent distributors, but rather was attributable to petitioners' inexperience in the industry and the poor quality of their product. Under such circumstances the *Bigelow* rule on uncertainty of damages is inapplicable.

II

The Courts Below Correctly Held That Petitioners Failed To Prove Illegal Conspiracy To Exclude Them From Competitive Access To The New York Market.

A. Section 5 of the Clayton Act and the *Emich* rule were in no way altered or limited.

Section 5 of the Clayton Act, 15 U. S. C. A. §16, provides that the final judgment or decree in a government antitrust action shall be *prima facie* evidence "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." This Court held in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951) that "The evidenciary use which may be made under §5 of the prior [judgment] * * * is thus to be determined by reference to the general doctrine of estoppel." 340 U. S. at 568. The Court went on to hold that before estoppel can be applied to any matter in the second suit, it must be clear that the matter was "distinctly put in issue and directly determined" in the prior Government action. 340 U. S. at 569. *Emich* was primarily concerned with the

question of determining what had in fact been "distinctly put in issue and directly determined" in a criminal action in which a general verdict of guilty had been returned. This Court formulated the following rule:

> "a verdict does not establish that defendants used all of the means charged or any particular one. Under these circumstances what was decided by the criminal judgment must be determined by the trial judge hearing the treble-damage suit, upon an examination of the record, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts." 340 U. S. at 569

The *Paramount* case was an equity proceeding which resulted in detailed findings of fact and conclusions of law. Thus the materials for discovering what was "distinctly put in issue and directly determined" in that proceeding are more readily at hand than would be the case where the prior proceeding was a criminal one.

The decisions of Judges Waterman and Dawson show clearly that the rule of law applied in this case fully accords with the statute and with this Court's decision in *Emich*. That the rule was correctly stated and applied by the District Court is illustrated by the following quotation from Judge Dawson's decision:

> "Plaintiffs rely on §5 of the Clayton Act, 15 U. S. C. §16, which makes final judgments in government anti-trust suits 'prima facie evidence' in private suits. The effect of §5 is to give the private litigant the benefit of the doctrine of estoppel by judgment as if it had been a party plaintiff to the government suit. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1951). For this reason the Court accepted in evidence the decree in the *Paramount*

> case and the findings of fact and conclusions of law in that case." (R. 568)

Not only did Judge Dawson admit in evidence *all* of the findings and conclusions in the *Paramount* case (Pl. Ex. 2, R. 362, 594) and the *Paramount* decree (Pl. Ex. 1, R. 57, 585, 585-644), but Judge Waterman in his affirming opinion stated clearly that:

> "We have examined these findings and conclusions [those few specifically called to the Court's attention by the petitioners], *as well as the many other findings and conclusions embodied in that decree.* We conclude that their relevance to the issues here in suit is even less than that of Finding No. 154(d) and Conclusion No. 16, which are discussed in detail in our opinion *infra.*" (R. 695 n. 5)

Judge Dawson, too, made clear that in admitting the decree in *Paramount* he was not limiting his consideration to part of the record only. During colloquy with counsel just prior to admitting the decree, findings and conclusion in evidence, Judge Dawson stated that under the *Emich* decision:

> "the Court may look at any of the papers or record or any other papers. That was a jury case, as I understand it, and the Supreme Court said that the judge could then charge the jury not merely on the basis of the decree but the decree in the light of all the record in the case.
>
> So this being a non-jury case, if the decree is admissible certainly I would have the right to look at any other papers in the case to guide myself as to what that decree meant the same as I would have to instruct the jury if there were a jury here." (R. 52)

In the face of this record, it is difficult to see how both petitioners and the Government in their briefs could claim that the Court of Appeals had failed to follow the *Emich* rule in its study of the *Paramount* case. The Government's brief (p. 8) asserts that the Court of Appeals committed a "basic error * * * in its failure to view the *Paramount* findings and conclusions as a whole." As evidence of an alleged "piecemeal approach" the Government cites the very portion of Judge Waterman's opinion of which part is quoted above, even though this portion specifically states that the Court considered, first, Finding 154(d) and Conclusion 16, second, the other portions of the decree called to its attention by the petitioners, and third, all of "the many other findings and conclusions embodied in that decree." We do not see why this can be called "piecemeal" except in the sense that the Court listed the findings it had considered under three groups. This is simply a recognition of the obvious fact that some of the *Paramount* findings were more relevant to this case than were others. Petitioners themselves of course recognized this, and called only certain of the findings and conclusions to the specific attention of the Court of Appeals (see Waterman, *J.*, R. 695 n. 5)

Petitioners in their brief state (p. 11) that the majority below discussed only a "single finding" and a "single conclusion," suggesting that the Courts below limited their consideration of the *Paramount* case to these "single" elements. This assertion is startling to say the least, in view of the very clear statements just quoted of both Judge Dawson and Judge Waterman of their thorough review of the *Paramount* record.

In short, even though petitioners may disagree with the conclusion reached by the District Court and by a majority

of the Court of Appeals that the entire *Paramount* case, including its "many other findings and conclusions", did not establish petitioners' conspiracy, it is clear that neither of these Courts narrowed or otherwise altered the rule of law established by this Court in the *Emich* case.

To give *prima facie* effect to matters not distinctly determined in a prior action, as petitioners would have at bar, can lead to very serious abuses of the judicial process. As Judge A. N. Hand stated on the record in the *Paramount* case itself, just prior to the entry of the decrees of February 8, 1950, such a use of the prior decree "is crude judicial stuff" (*Paramount* record, S. D. N. Y., Equity No. 82-273, S. M. 921). And as succinctly stated by the Court of Appeals for the Second Circuit in *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F. 2d 629, 631-2 (2d Cir. 1952), *cert. denied*, 344 U. S. 875:

> "whatever is crucial to the treble-damage case and is not *distinctly determined* in the previous government suit must be proven by direct evidence. Dipson Theatres v. Buffalo Theatres, 2 Cir., 190 F. 2d 951, 958, certiorari denied 342 U. S. 926, 72 S. Ct. 363. Section 5 does not permit a haphazard use of a criminal judgment merely for its aura of guilt, or 'to imply new wrongdoing from past wrongdoing.' Hastie, C. J., dissenting in Milgram v. Loew's, Inc., 3 Cir., 192 F. 2d 579, 595. See also Note, 65 Harv. L. Rev. 1400, 1404-1407."

There is not the slightest suggestion, in the rulings of this Court, among academic authorities, or even in petitioners' brief, that the estoppel doctrine applies to matters other than those "distinctly put in issue and directly determined." See, e.g., *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 101 n. 7, 102 (1954); *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322,

326 (1955); *Cromwell* v. *County of Sac*, 94 U. S. 351 (1876); Restatement, Judgments § 68 (1942). And we have just shown that the Courts below correctly applied the *Emich* rule in examining all portions of the *Paramount* record which were called to their attention, and more besides.

There is, moreover, not the barest shred of evidence in the record of "hostility" towards private treble damage antitrust action. Nor is there the slightest indication that the Courts below applied a rule of law which would be prejudicial to sound antitrust enforcement or which is inconsistent with Section 5, the *Emich* case, or the settled doctrine of estoppel as expounded in numerous decisions of this Court. And as pointed out above, the error of construction, even if it existed, could not affect the petitioners here, because the District Court expressly found as a fact that it was their low quality pictures and lack of experience that caused whatever losses they may have suffered.

B. The lower Courts' holding on the scope of the *Paramount* decree was correct.

Three of the four judges passing on the matter below held that the conspiracy adjudged to exist in the *Paramount* case is simply not the same conspiracy whose existence is alleged by petitioners. A careful review of the record in that case shows that there was no issue, finding, conclusion or other determination or adjudication that any of the defendants therein combined or conspired to exclude any *distributor*, including petitioners, from the opportunity of licensing their feature pictures on a competitive basis to the Loew's or RKO New York neighborhood theatres or to any other theatres. The gist of the *Paramount* case was that independent *exhibitors* were deprived of the runs and clearances to which they considered themselves

entitled, and the decision in that case was concerned with exclusion of independent *exhibitors, i.e.,* independent theatre operators, not with the alleged exclusion of *distributors.*

This emphasis in the *Paramount* case on exclusion of *exhibitors* was pointed up by this Court in its *Paramount* opinion at pages 166-67 of 334 U. S.:

> "The chief argument at the bar is phrased in terms of monopoly of exhibition, restraints on exhibition, and the like. Actually, the issue is even narrower than that. The main contest is over the cream of the exhibition business—that of the first-run theatres. By defining the issue so narrowly we do not intend to belittle its importance. It shows, however, that the question here is not *what* the public will see or *if* the public will be permitted to see certain features. It is clear that under the existing system the public will be denied access to none. If the public cannot see the features on the first-run, it may do so on the second, third, fourth, or later run. *The central problem presented by these cases is which exhibitors get the highly profitable first-run business.*"*

Petitioners' primary reliance was and is on *Paramount* Finding 154(d) and Conclusion 16. Finding 154(d) deals with "the first neighborhood run in New York City" and is the only finding purporting to deal with that local area (R. 636-37). It states that the Loew's and RKO theatres divided "the neighborhood prior run product of the various defendant distributors under a continuing arrangement so that there was no competition between them in obtaining pictures" (R. 636-37). That there may have been no competition between the Loew's and RKO neighborhood theatres in obtaining the pictures of the *defendant* dis-

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* Emphasis is the Court's, except in the last sentence.

tributors does not mean that Loew's and RKO neighborhood theatres did not license the product of independent distributors or that there was no competition between Loew's and RKO for the independent product. This finding does not establish that there was any exclusion of an independent distributor from competitive access to the Loew's or RKO theatres. The mere fact that RKO may not have sought to obtain films of some of the major distributors regularly licensed to Loew's and that Loew's may not have sought to obtain films of the other major distributors regularly licensed to RKO does not in any sense determine that an independent distributor with pictures to offer was excluded from the competitive opportunity to license them to either Loew's or RKO.

Similarly, Conclusion 16, in saying that Loew's and RKO monopolized the first neighborhood run in New York City and divided that market between themselves (R. 644) actually is a conclusion directly opposite to any theory that an independent distributor was excluded. The thrust of this Conclusion is that Loew's and RKO theatres monopolized the first neighborhood exhibition of all the available product to the exclusion of other "would-be" first neighborhood run *exhibitors*. The essential ingredient of any such activity by theatres would be the engrossment of all available product, thus creating a demand for, rather than an exclusion of, what all distributors had to offer. This demonstrates once again that the *Paramount* case dealing with the problem of the exclusion of exhibitors did not adjudicate anything as to alleged exclusion of distributors, the issue tendered in the case at bar.

Judge Dawson recognized this when he stated:

> "While the findings may perhaps constitute evidence (on which point the Court finds it unnecessary

> to pass) that Loew's and RKO had no competition between themselves in obtaining pictures from the defendant distributors who were parties to the *Paramount* case and had monopolized between themselves the first neighborhood run in New York City; the findings, standing by themselves, are certainly not evidence that there was no competition between Loew's and RKO in obtaining and distributing pictures of so-called 'independents' such as the plaintiffs in the present case." (R. 570)

Thus the Courts below, in construing the *Paramount* decree, expressly found that the conspiracy alleged by petitioners was not distinctly put in issue and directly determined to exist in the *Paramount* case. This determination was made following a searching and thorough review of the entire *Paramount* record. It was certainly not the result of any "hostility" towards treble damage antitrust cases, nor does it follow or enunciate any rule of law which would be prejudicial to sound antitrust enforcement.

Furthermore, the case at bar and *United States* v. *Paramount* differ not only in subject matter but in the time period covered as well.

None of the petitioners was in the business of distributing pictures prior to 1946, and none has been in that business since 1950. The violations of law found in the *Paramount* case all took place as of 1945 and prior years. The findings of fact in that case, upon which petitioners specifically rely to establish that the decrees are *prima facie* evidence of the existence of a conspiracy during 1946-1950, expressly provide at the outset that "unless otherwise stated these findings show the situation in 1945." None of

the findings or conclusions upon which petitioners rely states otherwise.

As stated above, a prior decree is admissible under Section 5 of the Clayton Act only if the doctrine of estoppel would apply. Manifestly, events occurring after 1946 could not possibly have been distinctly put in issue and directly determined in an action based on evidence relating to a period ending in 1945. There is therefore no basis for an estoppel, and it follows that the *Paramount* decrees cannot be utilized to establish *prima facie* a later conspiracy in 1946-1950. As this Court stated in *Third National Bank of Louisville* v. *Stone*, 174 U. S. 432, 434 (1899):

> "A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen."

Even if the conspiracy found to exist as of 1945 was the conspiracy whose existence is alleged by petitioners, and we contend most strongly that it is not (pp. 37-40 above), there is considerable doubt whether under the rulings of this Court a conspiracy found to exist at one period of time can be used under the estoppel doctrine in a later suit as the basis for an inference that the same conspiracy existed at a different period of time. See *Yates* v. *United States*, 354 U. S. 298, 337-38 (1957).

In this connection, the Court of Appeals for the First Circuit recently affirmed the action of a District Court in *completely excluding* the *Paramount* decree from a private theatre owner's treble damage action. A major ground relied upon was that the plaintiff's allegations related to a period of time beginning in 1947, whereas the *Paramount* decree adjudged a fact situation to have existed in 1945.

Park Neponset Corp. v. *Smith,* No. 5347, 1st Cir., August 29, 1958. A District Court has recently reached the same result with respect to the *Schine* decree. *Webster Rosewood Corp.* v. *Schine Chain Theatres,* 157 F. Supp. 251, 256 (N. D. N. Y. 1957).

In their brief, petitioners claim to have made "an independent showing" that the *Paramount* conspiracy continued in the period 1946 through 1950 (p. 6). An examination of the "independent showing" referred to (R. 648) shows that it consists, as to respondent Loew's, solely of a chart indicating that Loew's received its film rentals from approximately the same companies and in the same proportions as it did in 1945.

This sole evidence as to Loew's is hardly sufficient to justify an inference that illegal practices found to have existed as of 1945 continued thereafter.

Both the petitioners (Brief, p. 6 n. 6) and Judge Clark in his dissent (R. 707) pointed out that after remand of the *Paramount* case from this Court further evidence was taken and the court declined to make any changes in the findings and judgment. But this begs the issue, for the findings specifically speak in terms of 1945 and prior years, so that evidence concerning a later period would not affect the validity of those findings in any event. Moreover, the fact that after 1945 some or all of the unlawful practices were discontinued by the defendants would not have caused the court to change the injunctive provisions of the decrees. Respondents had been found to have violated the law in 1945, and no matter what the change in circumstances occurring in the ensuing years, those illegal practices were rightfully enjoined. But it does not mean that the same practices continued after 1945.

III

Petitioners Have Decisively Rebutted Any *Prima Facie* Effect Which The *Paramount* Decree Might Be Held To Have.

Even if petitioners' construction of the *Paramount* decree were to prevail on every point, the decree would be only *prima facie* evidence, under Section 5, of the conspiracy charged by them.

Petitioners argue, as does the dissenting opinion in the Court of Appeals, as though the District Court had dismissed the complaint at the close of the petitioners' case. In other words, the entire thrust of their consideration of the *Paramount* decree is in the direction of whether or not the decree, the findings and the conclusions establish *prima facie* the conspiracy alleged to exist by the petitioners here. Both the brief of petitioners and the dissenting opinion of Judge Clark are so absorbed in the question of what was involved in the *Paramount* case that they overlook the volume and probative force of the evidence offered by respondents in rebuttal of the *prima facie* case.

Mr. Schwartz, the president of RKO, and Mr. Vogel, the president of Loew's, both testified as to the general method followed in purchasing films (Schwartz, R. 405-16; Vogel, R. 464-78). The first major step is "screening" pictures made available for that purpose by the various distributors (R. 405, 464-65). This procedure was followed with respect to pictures of the petitioners. The petitioners did not furnish any evidence on the extent to which they made films available for screening. It is undisputed, however, that during the period in question, Loew's screened not less than 108 of the 195 Eagle Lion pictures and that RKO

screened at least 129 Eagle Lion pictures (R. 562). Petitioners concede, moreover, that Loew's screened all of the petitioners' pictures made available to it for that purpose (R. 532). The District Court recognized both of these facts, saying:

> "The undisputed testimony was that of the 195 pictures distributed by the plaintiffs in this period, Loew's 'screened' not less than 108 pictures and RKO 'screened' at least 129 pictures. No contention has been made that the defendants refused to 'screen' these pictures with a view toward seeing whether they would be purchased by them. Plaintiffs concede, for example, that defendants 'screened' all of plaintiffs' pictures made available to it for that purpose." (R. 562)

The next major step is negotiation for licenses on the films which screening has revealed as desirable (R. 405, 466). This process was described as follows by Mr. Schwartz:

> "there is a regular series of negotiations and back and forth discussion as to whether we will buy, whether we won't buy, how much we will pay and so forth.
>
> The determining factors of whether a picture should be bought are gone over very carefully by the people who are experienced by trial and error of many years as to what type of pictures appeal to certain neighborhoods and appeal to the largest percentage of people that we think we can attract to our theatres.
>
> • • • • •
>
> We carefully study and evaluate what we have seen and try to come to a decision on the basis, as

> I said before, of what is available and what we need and what we think will produce the best revenue for the theatre and for the company, and proceed to try to get that picture or proceed to pass up the picture that we don't think fits our needs." (R. 405, 406)

Mr. Vogel described the process as follows:

> "Sometimes we wait [im]patiently for a picture that we hear is very good, we keep bothering the film company to view it so that we can decide how much we want to pay for it. Sometimes the film company calls and says the picture is here and we would like you to look at it; we want to sit down and talk to you about buying it.
>
> Done all different ways. Each company has a different method. Sometimes the companies are anxious for you to buy it, sometimes they are not too anxious." (R. 466)

Petitioners have not introduced any evidence on the extent to which they participated in this selling and negotiation process. On the contrary, their only witnesses were Mr. MacMillen, an executive who admittedly had nothing to do with the sale or distribution of pictures to exhibitors (R. 116), Mr. Gross, an accountant who joined the petitioners after the period involved in this action (R. 127), Mr. Kaplan, a California attorney who apparently dealt only with producers (R. 331-35), Mr. Peoples, a partner in the accounting firm of Peat, Marwick, Mitchell & Co., auditors for Chesapeake (R. 257-58), and Mr. Agnew, who was never employed by the petitioners in any capacity whatsoever (R. 535-37). As mentioned above, both the District Court and the Court of Appeals noted petitioners' failure to offer any testimony of their sales executives with

reference to efforts to license their pictures (pp. 12-13 above).

Apparently in an effort to escape the consequences of not having offered such proof, petitioners take the position that they do not complain of discrimination in respect of any particular picture or class of pictures, but refer only to their relative over-all performance in the New York neighborhood market. This approach is wholly unreliable as a method to test petitioners' claim that they did not get the playing time or position or rental terms in the RKO and Loew's circuits which their pictures deserved on the merits. It is apparent from the testimony of Schwartz and Vogel summarized above, that pictures are screened and licenses negotiated on an individual picture basis. But there was no testimony that any one of petitioners' pictures had been offered on certain terms and rejected by respondents. The District Court quite properly concluded (R. 579-80) that the record is barren of evidence of any unsuccessful attempts by petitioners to get a picture in the Loew's and RKO circuits on terms they felt were deserving. Said the District Court (R. 580):

> "Whether the terms were the result of a poorer quality of the films or inferior selling efforts of the plaintiffs, or were the result of a preference of the defendants to take other films which were then available, is not established by the evidence. * * *"

Undeniably Loew's exhibited 89 of petitioners' 195 pictures in its neighborhood theatres and between them RKO and Loew's exhibited in their full circuits all 18 of petitioners' pictures which grossed nationally more than $500,000 (R. 575). Seventeen of these played the long half of the week and six had top billing (*Ibid.*). If petitioners

were of the opinion at the time these pictures were licensed that any one deserved better treatment or that larger rentals were warranted, why did they fail to come forward with testimony to that effect.

Respondents' evidence, on the other hand, was that each of these pictures received the best playing time and position to which its merits entitled it (Loew's Ex. F, R. 506, 673), and this proof was never contradicted even though, as noted above, Judge Dawson warned them of this defect in their case (R. 348-50).

Despite petitioners' reticence with respect to what actually happened in the course of the process of negotiating and buying, the record establishes the following additional facts, which are completely inconsistent with the existence of conspiracy or combination of any sort:

1. Neither RKO nor Loew's knew whether the other had screened or was negotiating for any particular picture, either of the petitioners or of any other distributor (R. 440-41, 446, 477). As stated by the District Court:

> "The presidents of both defendants denied explicitly that there was any agreement between the defendants relating to the licensing of pictures of the plaintiffs or that either of them knew about the negotiations which the other had with reference to licensing pictures from the plaintiffs." (R. 566)

2. Loew's and RKO never had any agreement or understanding either among themselves or with any other distributor that either of them would not play Eagle Lion pictures or that either of them would or would not license the pictures of any other distributor (R. 415-16, 478).

3. Each of the respondents in fact licensed and exhibited the films of a large number of distributors (R. 429, 466; Loew's Ex. E, R. 469†). The record demonstrates (Loew's Ex. H, R. 529, 675; RKO Ex. D, R. 439†), and the Trial Court found, that:

> "during the period in question, Loew's licensed pictures from 38 distributors and RKO licensed pictures from over 30 distributors." (R. 563)

4. Over 90% of petitioners' pictures fared comparatively *better* in the New York metropolitan area than did pictures of the *Paramount* defendants falling in the same class (Loew's Ex. B, R. 306, 669). As to the remainder, there was uncontradicted evidence that they received the terms and playing positions to which they were entitled by their merits (R. 469-77, 511-12).

In short, there is uncontradicted testimony that there was no agreement between RKO and Loew's or between either of them and anyone else restricting the showing of petitioners' pictures in any theatres of the defendants. Petitioners' pictures were, in fact, considered and dealt with on the same basis as pictures of other distributors, and both of the respondents played a very substantial number of petitioners' pictures in their theatres. There was no evidence of any discriminatory treatment given to any one of petitioners' 195 pictures. Far from demonstrating any conspiracy, the record shows that the respondents, acting independently, dealt with petitioners' pictures in the same manner as they dealt with pictures of other distributors.

CONCLUSION

The judgment below should affirmed.

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Respectfully submitted,

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